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No. 87-1993

In The

Supreme Court of the United States

October Term, 1988

ANTHONY H. ROBINSON,

Petitioner,

v.

VIRGINIA STATE BAR, *ex rel.*
THIRD DISTRICT COMMITTEE,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTION PRESENTED

Whether the Supreme Court of Virginia's dismissal of Petitioner's appeal for failure to conform to the Court's perfection of appeal requirements violated Petitioner's constitutional rights?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Respondent, Virginia State Bar, Third District Committee respectfully opposes Anthony H. Robinson's petition to this Court for writ of certiorari to the Supreme Court of Virginia.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional provision is the Fourteenth Amendment, Section 1 to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provision governing this appeal is Va. Code § 54-74(5):

> Appeal – The person or persons making the complaint or the defendant, may, as of right, appeal from the judgment of the court to the Supreme Court, by petition based upon a true transcript of the record, which shall be made up and certified as in actions at law . . .

Also applicable are the following Rules of the Supreme Court of Virginia:

Rule 5:5(a). Extension of Time; Filing by Mail.

> (a) The times prescribed for filing the notice of appeal (Rules 5:9(a), 5:14(a) and 5:21(c)), the transcript or written statement (Rule 5:11), a petition for appeal (Rules 5:17(a) and 5:21(g)) and a petition for rehearing (Rules 5:20 and 5:39), are mandatory. The time period for filing the notice of appeal is not extended by the filing of a motion for a new trial, a petition for rehearing, or a like pleading unless the final judgment is modified, vacated, or suspended by the trial court pursuant to Rule 1:1 or a rehearing is granted by the Court of Appeals. In any such case the time for filing shall be computed from the date of the final judgment entered following such modification, vacation, suspension, or rehearing.

Rule 5:9. Notice of Appeal.

(a) Timeliness. – No appeal shall be allowed unless, within 30 days after entry of final judgment or other appealable order or decree, counsel for the appellant files with the clerk of the trial court a notice of appeal and at the same time mails or delivers a copy of such notice to all opposing counsel.

Rule 5:20. Denial of Appeal; Petition for Rehearing.

When a petition for appeal is denied, the clerk of this Court shall mail a copy of the order denying the appeal to counsel for the appellant and counsel for the appellee. Counsel for the appellant may, within 14 days after the date of this notice, file a petition for rehearing in the office of the clerk of this Court. The petition shall state that a copy has been mailed or delivered to counsel for the appellee. Eight copies shall be filed. Carbon copies are acceptable. Oral argument on the petition for rehearing will not be allowed. No responsive brief shall be filed unless requested by this Court. The clerk of this Court shall notify counsel for the appellant and counsel for the appellee of the action taken by this Court on the petition for rehearing.

Disciplinary Rule 5-105. Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proferred employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proferred employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional

judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

STATEMENT OF THE CASE

Anthony H. Robinson (hereinafter, the "Appellant") challenges the February 19, 1988 decision of the Supreme Court of Virginia to dismiss his appeal of a one year suspension of his license to practice law. The suspension was ordered on October 21, 1987 by a Three Judge Panel, designated by the Chief Justice of the Virginia Supreme Court. A notice of appeal was filed with the trial court clerk on November 25, 1987, which was 5 days later than the deadline imposed by Rule 5:9 of the Rules of the Supreme Court of Virginia. As shown in Appellant's Appendix A, p. 18, the Court dismissed the appeal on the basis of Rule 5:9. On April 13, 1988, the Court denied his request to vacate the dismissal order, see Appellant's Appendix A, p. 29.

Disciplinary proceedings initially began on March 10, 1987, when the Virginia State Bar Third District Committee (the "Committee") held a hearing to investigate certain complaints of ethical misconduct by the Appellant. After hearing the testimony of the complainant, Robinson, and his affected clients, the Committee made the following Certification:

Statement of Misconduct

1. Anthony H. Robinson, the respondent, is an attorney and is presently licensed to practice in Virginia during all times relative to these proceedings.

2. Respondent undertook representation of a driver of an automobile in a personal injury case and also undertook representation of a passenger in the same vehicle who was injured at the time.

3. Respondent entered a nolo contendere plea in the traffic matter for the driver of the vehicle, it being determined that the liability for said accident was lodged with the driver of the automobile.

4. Counsel for the insurance company informed respondent of the apparent conflict of interest in representing both the driver and the passenger of the vehicle wherein the driver of said vehicle was at fault.

5. Respondent refused to acknowledge said conflict and continued representing both parties in the matter.

6. Counsel for the insurance company filed a petition in the General District Court for the City of Richmond, Civil Division, to have respondent removed from the case. Respondent finally acquiesced and withdrew from the matters hereinabove referred.

7. As a result of the foregoing, the Committee finds by clear and convincing evidence that the respondent has violated the following disciplinary rules of the revised Code of Professional Responsibility effective October 1, 1983: DR 5-105(A), (B) and (D).

A Statement of the Charges of Misconduct was sent to the Appellant on June 23, 1987. He made a timely demand that the allegations of misconduct be heard by a Three Judge Panel pursuant to § 54-74 of the Code of Virginia. A Rule to Show Cause why his license to practice law should not be revoked or suspended was issued on August 3, 1987.

The Three Judge Panel had a hearing on September 28, 1987 at the Circuit Court of the City of Richmond. After hearing testimony from the complaining witness, Mr. Christopher C. Spencer, Mr. Robinson's former clients, Ms. Stokes and Ms. Washington, Ms. Stokes' father and Mr. Robinson, the Three Judge Panel adopted the Third District Committee's first six findings of fact and found that Mr. Robinson's conduct constituted misconduct in violation of Disciplinary Rules 5-105(A), 5-105(B) and 5-105(C). The Panel ordered that Mr. Robinson's license to practice law within the Commonwealth of Virginia be suspended for a period of twelve (12) months, effective December 1, 1987. Contrary to Appellant's statement in his Petition, counsel for the Bar made no recommendation as to the length of suspension.

Although the Appellant was ordered to give notice of this suspension to his clients, to make arrangements for the disposition of their business and to give evidence of such compliance to the Bar, no evidence of such compliance has been received to date. The Virginia Supreme Court issued a stay on April 13, 1988 and then further deferred the mandate until July 12, 1988. The legal effect of a stay issued on January 20, 1988 by

one member of the Three Judge Panel remains unsettled. On April 6, 1988 a quo warranto petition was filed in the Circuit Court of the County of Chesterfield contesting the Appellant's right to practice law after March 4, 1988 (fourteen days following the dismissal). Also pending is a Renewed Motion for a Writ of Supersedeas in the Supreme Court of Virginia, which seeks a retroactive stay of the October 21, 1987 order.

REASONS FOR DENYING THE WRIT

I. DISMISSAL OF PETITIONER'S APPEAL IS NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

This petition seeks review of the decision of the Supreme Court of Virginia to dismiss Appellant's Petition for Appeal on the ground that it was not perfected according to the applicable state statute and court rules. Appellee (hereinafter "the Bar") recognizes that those aggrieved by Virginia State Bar disciplinary proceedings "*may*, of right, appeal from the judgment of the Court to the Supreme Court." Code of Virginia, § 54-74(5) (emphasis added). The Bar, however, disagrees that a right to appeal in any way absolves the Appellant from failing to adhere to the mandatory filing requirements and timetable specified in the Rules of the Supreme Court of Virginia. Further, the Bar argues that the dismissal did not abridge Appellant's constitutional rights, as guaranteed by the Fourteenth Amendment to the Constitution of the United States. Therefore, there was no reason for the Court to waive its perfection of appeal requirements.

A right to appeal does not dispense with the Court's rules regarding filing requirements and time deadlines; nor does it require the Virginia Supreme Court automatically to hear all lawyer disciplinary cases. Section 54-74(5) of the Code of Virginia requires that an appeal from a Three Judge Panel is to be perfected as an action at law. Rule 5:9 requires that the Appellant file a notice of appeal with the clerk of the trial court within 30 days after the entry of final judgment or "no appeal shall be allowed." The rule is mandatory. Adherence to these requirements is to be complied with strictly. *Mears v. Mears*, 206 Va. 444, 445, 143 S.E.2d 889, 890 (1965); *Tharp v. Commonwealth*, 211 Va. 1, 175 S.E.2d 277 (1970); *Vaughan v. Vaughan*, 215 Va. 328, 210 S.E.2d 140 (1979).

The record clearly reflects that Appellant failed to note his appeal with the Circuit Court Clerk within 30 days of final judgment as required by Va. Code § 54-74(5) and Rule 5:9. Although Appellant sent a letter of intention to appeal to the Virginia State Bar on the 30th day, this did not constitute a notice of appeal. It was only after counsel for the Bar directed his counsel to § 54-74 of the Code that the late notice was sent to the Clerk. This notice was sent 35 days after final judgment and thus, was not in compliance with Rule 5:9.[1]

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[1] In dismissing this appeal, the Court expressly rested its decision on Rule 5:9. Appellant states that the Court "allegedly" (Petition for Writ of Certiorari at pp. 6, 10), based its decision on Rule 5:9, thereby implying that other reasons motivated the Court. Such unsupported statements of "bad faith" are counterproductive at best and obviously disrespectful to the Court.

As announced in *Tharp, supra*, 211 Va. at 3, the Virginia Supreme Court will extend filing deadlines if a denial or dismissal would, in effect, abridge a constitutional right. In *O'Brien v. Socony Mobil Oil*, 207 Va. 707, 152 S.E.2d 278, cert. denied, 389 U.S. 825 (1967), the Supreme Court of Virginia declined to waive the mandatory requirements of the Rules of Court regarding perfection of appeal, finding that there was no precedent for waiver since the appellant had not been denied her constitutional rights. In justifying its decision, the Court explained that prior waivers had been granted to habeas corpus petitioners who, in light of certain United States Supreme Court mandates, had been denied constitutional rights. This appeal, likewise, fails to assert a valid constitutional abridgment which would necessitate a waiver. Also see *Hirschop v. Commonwealth*, 209 Va. 678, 166 S.E.2d 322, cert. denied, 396 U.S. 845 (1969), another case in which this Court let stand the decision of the Supreme Court of Virginia to deny an attorney's writ of error because he failed to perfect the appeal of his criminal contempt conviction in a timely fashion.

Appellant raises, in very general terms, an infringement of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. His authority is *Hutto v. Waters*, 552 F.Supp. 266, 269 (E.D. Va. 1982), an employment dispute alleging a deprivation of procedural due process. Appellant, however, does not maintain that he has been a victim of arbitrary and irrational classification or invidious discrimination stemming from prejudice or hostility; nor does he dispute the rational basis of the state's lawyer

disciplinary procedures. *See Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957).

Assuming Appellant is asserting a due process violation, the case law is clear that a right to appeal does not guarantee an appeal to a litigant who fails to meet filing deadlines. In *Meade v. Cox*, 310 F.Supp 233 (W.D. Va. 1970), aff'd, 438 F.2d 323 (4th Cir.), cert. denied, 404 U.S. 910 (1971), the District Court specifically held that due process of law does not require that the Virginia Supreme Court automatically hear an appeal on all denials of habeas corpus petitions. In dismissing the case based on the petitioner's failure to file a notice of appeal, the Court stated: "Petitioners in habeas corpus must follow the rules of Court as must all other parties who wish to appeal." *Meade*, 310 F.Supp at 239. Also see *Williams v. Landon*, 1 Va. App. 206, 336 S.E.2d 907 (1985), in which the Virginia Court of Appeals cites the holding in *Meade* and dismisses a habeas corpus appeal for appellant's failure to file a timely notice of appeal. In *Turner v. Commonwealth*, 2 Va. App. 96, 341 S.E.2d 400 (1986), the Virginia Court of Appeals again held that the time prescribed for filing a notice of appeal is mandatory. In this case, the Court dismissed a direct appeal (or appeal of right) from the Circuit Court of a forging and uttering criminal conviction.

In summary, Appellant has not been denied the right to a "de novo" review as he claims he is entitled on page 7 of the Petition for Writ of Certiorari. He simply has, by his own tardiness, forfeited his right to seek an "independent examination of the record." *Blue v. Seventh District Committee of the Virginia State Bar*, 220 Va. 1056, 265 S.E.2d 753 (1980).

II. DISMISSAL OF PETITIONER'S APPEAL WAS NOT AN ABUSE OF JUDICIAL DISCRETION

Traditionally, states have been given considerable deference by the United States Supreme Court in the control and supervision of the practice of law. *See Norfolk and Western R. Co. v. Beatty*, 423 U.S. 1009 (1975), summarily aff'g 400 F.Supp. 234 (S.D. Ill.). The Court's reluctance to "sit in judgment" of state court decisions in bar matters also was stated in *Theard v. U.S.*, 354 U.S. 278 (1957). Appellant, however, seeks review on the additional basis that the Virginia Supreme Court has abused its judicial discretion in arbitrarily dismissing this lawyer disciplinary appeal.

Citing *Avery v. County School Board*, 192 Va. 329, 64 S.E. 767 (1951), Appellant advances the argument that the Court "punished" him by applying Rule 5:9 arbitrarily. Upon close examination, the *Avery* case discloses the Court's rationale for imposing filing deadlines. That case presented a situation in which the appellant had failed to designate, within the time provided for in the Rules of Court, the parts of the record they desired printed. In dismissing the appeal, the Court found that the rule was not simply directory, but mandatory. The Court described the step as an essential feature of taking an appeal and reasoned as follows:

> . . . the orderly administration of justice requires that certain rules must be obeyed, however technical they may seem to be. This is particularly true of time limits . . . If there is to be any time limit, it must be specified; and if there were no time limit,

> the appellee would never know when his case was ended.

Avery v. County School Board, supra, 192 Va. at 331. Strikingly similar is this Court's reasoning in *Browder v. Director, Ill. Dept. of Corrections*, 434 U.S. 257, 264 reh'g denied, 434 U.S. 1089 (1977), which interprets Fed. Rule App. Proc. 4(a) and 28 U.S.C. § 2107:

> . . . a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken. The 30-day time limit is "mandatory and jurisdictional." (citations omitted). The purpose of the rule is clear: It is "to set up a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose." (citations omitted).

In accord is *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982); also see *Cole v. Violette, et al.*, 319 U.S. 581 (1943).

Given the previously cited litany of Supreme Court and Court of Appeals opinions, it is clear that the mandatory Rules of Court regarding perfection of appeals are routinely enforced in Virginia. Absent a showing that the Court casually or randomly waives those requirements, this decision to enforce the Rules of Court is well within the bounds of acceptable judicial discretion. Likewise, it is in conformity with this Court's view regarding mandatory perfection of appeal requirements.

III. THE REFUSAL TO VACATE OR RECONSIDER THE DISMISSAL WAS NOT AN ABUSE OF JUDICIAL DISCRETION

Following the dismissal of this appeal, Appellant then failed to seek a rehearing in a timely fashion. Rule 5:20 of the Rules of the Supreme Court of Virginia specifically requires that a request for rehearing is to be filed within fourteen days after the date of the notice of the order denying the appeal. Appellant's "Motion to Vacate" was filed on March 18, 1988, 26 days after the denial of the appeal. This rule, also, is mandatory as expressly required by Rule 5:5 and the previously cited case authorities. As stated in *Tharp*, *supra*, 211 Va. at 2, the "practice of granting extensions had led to abuse . . . contributed to delay. . . ."

Appellant seeks refuge from accepting responsibility for his failure to seek appellate review by blaming his attorneys. He cites *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974) and argues that the Virginia Supreme Court should be reluctant to punish a client for the behavior of his lawyer. Aside from the obvious distinction – Mr. Robinson is not a ill-informed layman as was the client in *Reizakis* – the case at bar is decidedly different. In fact, Appellant's case suffers from the express circumstances outlined in *Reizakis* that necessitate dismissals: "a drawn out history of deliberately proceeding in dilatory fashion." *Reizakis*, 490 F.Supp. at 1135, quoting *Link v. Wabash R.R.*, 370 U.S. 626 (1962).

Appellant also cites *Hartscock v. Powell*, 199 Va. 320, 99 S.E.2d 581 (1957) as an example of a case in

which a "good cause" time extension was granted. That case involved counsel who was a member of the Virginia General Assembly. He was specifically protected by a state statute, which authorized waivers of filing requirements and time extensions for Assembly members involved in litigation during the legislative session.

In summary, Appellant has failed to demonstrate that the Supreme Court of Virginia was arbitrary, abusive, or in any way misapplied judicial discretion in enforcing its rules governing the perfection of appeals.

CONCLUSION

The Supreme Court of Virginia properly dismissed this lawyer disciplinary appeal on the basis of Appellant's failure to file a timely notice of his appeal to the trial court clerk as expressly required by the state statute, the Rules of Court, and well established case precedent. This exercise of judicial discretion did not offend the Appellant's constitutional rights. A waiver of the jurisdictional requirements was not called for in these circumstances. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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